



Arizona Department of Education
Office of Superintendent Kathy Hoffman

November 14, 2019

Timothy Sandefur
Vice President for Litigation
Scharf-Norton Center for Constitutional Litigation
500 E. Coronado Road
Phoenix, AZ 85004

Mr. Sandefur:

I am writing in response to both your November 7, 2019 letter, and the November 12, 2019 Notice of Claim referenced in today's press release from the Liberty Justice Center and the Goldwater Institute.

As to the November 7, 2019 letter:

In your letter you state that the Goldwater Institute had been contacted by numerous families who had not received their second quarter ESA funds, and you point out the Department's statutory obligation to "make quarterly transfers [...] into the Empowerment Scholarship Account of each qualified student." While you correctly interpret the Department's statutory obligation to administer empowerment scholarship account (ESA) funds to qualified students on a quarterly basis, your letter overlooks additional and *critical* components of ARS §15-2403. Under ARS §15-2403(b) the Department is also statutorily obligated to audit empowerment scholarship accounts to ensure funds are being spent and reported in compliance with Arizona law. (ARS § 15-2403(b)).

Quarterly auditing of Empowerment Scholarship Accounts, in combination with guidance and policies set forth in the ESA Parent Handbook, are designed to ensure Parents use ESA funds in compliance with Arizona statute statutes, and to protect against potential misspending. In the process of auditing, some expenses may be rejected due to a disallowance, missing receipts, or simply illegible documentation. When this occurs, ESA staff contacts the ESA recipient and the recipient has an opportunity to make timely corrections. Although the Department cannot control whether ESA recipients submit compliant expense reports (ESA does issue guidance on how to prepare expense reports in the ESA Handbook), ESA staff is dedicated to working with families to address disallowed spending, seek clarification on missing documentation and allow for the timely resubmission of illegible documentation. However, the Department sees the oversight and administration of ESA funding as inextricable under the law.

As of November 12, 2019, any ESA recipient who has submitted his or her expense report, and has been approved, has received funding for quarter two. It is my understanding that some ESA recipients may still be in the process of resubmitting previously rejected second quarter reports, ESA staff is currently working with these families to make the necessary corrections for payment on these reports.

Your letter also states that the delay in ESA recipients funding has resulted in the Department violating ESA students' rights under the Individuals with Disabilities Education Act (IDEA). Parents who elect to participate in the ESA program waive students' entitlement to a free and appropriate education (FAPE) under the IDEA when they agree to release the school district from all obligations to educate the qualified

Kathy Hoffman, Superintendent of Public Instruction

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student. *See* (ARS §15-2402(B)(2)). Each parent must make the calculation as to whether sacrificing IDEA's FAPE and IEP requirements, as well as its procedural safeguards, is appropriate for their student's particular situation. As it pertains to the families represented in your letter, these parents have elected to forego FAPE as part of their enrollment in the ESA program (ARS 15-2402(B)(2)), and as such, the allegation that the Department is in violation of 20 USC §1412(a)(1)(A) and 34 CFR §300.154(1) is inapplicable in this matter.

As to the Notice of Claim:

On November 12, 2019, the Department was made aware of a Notice of a Claim regarding an ESA recipient purporting "[S]he had received no deposit for the second quarter now 12 days after the deadline." That same day, the Department, through its counsel, informed counsel for this ESA recipient, that the student at issue in that claim had been fully funded as of November 5, 2019. Thus, this Notice of Claim appears null.

In conclusion, the Department stands ready to serve all qualified students eligible to receive ESA funding, and reminds both the Goldwater Institute and Liberty Justice Center, that ESA staff welcomes ESA recipients' direct inquiries regarding account status and compliance via phone or email.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Carruth".

John Carruth
Chief of Staff, Arizona Department of Education

cc: Daniel Suhr, Liberty Justice Center
Aaron T. Martin, Martin Law and Mediation PLLC